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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-799

UNITED STATES OF AMERICA,
Petitioner,
vs.
FOSTER LUMBER COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The issue in this tax case is whether, in carrying back a net operating loss to a year in which the taxpayer had ordinary income and capital gain of such amounts that Section 1201 of the Internal Revenue Code (providing for the so-called "alternative tax") was required to be used in determining the tax for that year, the loss available for carryover to a succeeding year is the amount by which the loss exceeds only the ordinary income for the prior year, as the decision below held, or the amount by which the loss exceeds both the ordinary income and capital gain for the prior year.

Parallel Petitions for Writs of Certiorari Now Pending

This case raises the identical issue as *Data Products Corporation* v. *United States,* judgment in which was entered by the United States Court of Appeals for the Ninth Circuit on December 27, 1974, and which is not yet officially reported. Petitions for writs of certiorari in that case have been filed both by Data Products Corporation, No. 74-854, and by the United States, No. 74-996.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The issue raised by this case and by the *Data Products Corporation* case is purely technical and computational in nature. It involves no significant problem of tax philosophy or tax policy. This sort of issue is hardly a matter of sufficient importance to merit the attention of this Court.

Furthermore, the law on this issue has been well settled, with not only the First,[1] Eighth,[2] and Ninth[3] Circuits, but also the Tax Court[4] holding in favor of the taxpayer. Only recently was the United States able to obtain an apparently conflicting decision by the Fourth Circuit.[5] However, in view of the taxpayer's small economic stake in that Fourth Circuit case (so small that the taxpayer, know-

1. *Chartier Real Estate Co.* v. *Commissioner,* 428 F.2d 474 (1970), affirming the decision of the Tax Court cited in footnote 4.

2. *United States* v. *Foster Lumber Company, Inc.,* 500 F.2d 1230 (1974), the decision below in the present case.

3. *Data Products Corporation* v. *U. S.,* ..... F.2d ..... (1974); *Olympic Foundry* v. *U. S.,* 493 F.2d 1247 (1974).

4. *Chartier Real Estate Co.* v. *Commissioner,* 52 T.C. 346 (1969). The Tax Court has continued to follow this decision.

5. *Mutual Assurance Society of Virginia* v. *Commissioner,* 505 F.2d 128 (1974).

ing of the petition in this case, has not even sought review by this Court), it appears plausible that the taxpayer may have had little incentive to pursue the matter vigorously on appeal. It may well be that when a taxpayer within the jurisdiction of the Fourth Circuit has enough financial involvement to justify rearguing the question at greater length, that court may be persuaded to follow the views of the majority.

Respondent places great weight on the decision by the United States Tax Court on this issue. The Tax Court has been deemed by this Court to be an expert tribunal for the resolution of technical tax issues, *McDonald* v. *Commissioner,* 323 U.S. 57 (1944); *Dobson* v. *Commissioner,* 320 U.S. 489 (1943). Moreover, the opinion of the Tax Court on this issue appears to be, in retrospect, the best and most workmanlike opinion yet rendered on the question. Even the United States agrees in its petition in this case that the Tax Court's opinion ". . . contains the most detailed statement in support of the court below" (Pet. 6). Respondent submits that the opinion of the Tax Court, as affirmed by the First, Eighth, and Ninth Circuits, should be permitted to stand as a uniform interpretation of the applicable statutes by a national court, at least until a real conflict has developed in the Fourth Circuit, or elsewhere, in a case maintained by taxpayer with enough financial interest in the issue to assure a vigorous presentation of the taxpayer's side of the case. Not before then should this Court feel it necessary to apply its time and energies to the resolution of this minor computational issue.

Considering the relative unimportance of the tax question here presented and the degree of unanimity among the authorities which have given that question thorough consideration, this case is but another example of the government's carrying to an absurd degree its unwillingness

to accept defeat with good grace. Justice Douglas warned of this when he stated in his concurrence to *Commissioner* v. *Lester*, 366 U.S. 299, 307 (1961), that "[r]esort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer." See also his dissents in *Knetsch* v. *U. S.*, 364 U.S. 361, 371 (1960) and *U. S.* v. *Skelly Oil Company*, 394 U.S. 678, 687 (1969). This Court, should it grant the premature consideration of the issue requested by the United States, would only encourage further this long-standing and widely-deplored policy of the government, which will continue to be pursued in costly general engagements with taxpayers without regard to the real significance of the issues being litigated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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